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Nos. 93-1612, 93-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONSBANK OF NORTH CAROLINA, N.A., *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

EUGENE LUDWIG, *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

On Writs of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, et al.,* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court correctly construed Section 92 of the National Bank Act as a limitation on the incidental powers of national banks as determined by the Comptroller, notwithstanding that in the Act Congress expressly conferred on national banks in small towns insurance agency powers that are "in addition to the powers now vested by law in national banking associations."

2. Whether the court below correctly overturned the determination by the Comptroller of the Currency that 12 U.S.C. Section 24 (Seventh) permits national banks to broker annuities, notwithstanding that the Comptroller's interpretation was reasonable and the court's exceptionally narrow construction of the incidental powers of national banks is contrary to the great weight of authority throughout the United States.

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The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioners in accordance with Supreme Court Rule 37.3. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

The American Bankers Association is the principal national trade association of the commercial banking industry in the United States, representing banks located in each of the fifty states and the District of Columbia, banks of all sizes and both national and state-chartered banks. Assets of ABA member banks comprise over ninety percent of the domestic assets of all commercial banks in the country.

The Association of Banks in Insurance, Inc. ("ABI") is a national trade association of financial institutions with an interest in insurance activities. The ABI was organized to protect and further bank insurance powers. Its members include insurance companies, banks, and bank holding companies owning national and state banks, and other companies engaged in the insurance business.

The Bankers Roundtable is a national association whose membership is open to the nation's 125 largest banking companies, which are represented in the Roundtable by the CEOs and highest officers of the companies. Members hold approximately seventy percent of the country's commercial banking assets, operate in virtually every state and employ almost one million individuals. The mission of the Roundtable is to promote the business of banking, to encourage the development of sound banking and financial policies and practices, and to advocate the interests

of its member companies in federal legislative, regulatory and judicial bodies.

The Consumer Bankers Association ("CBA") was founded in 1919 to provide a progressive voice for the retail banking industry. CBA represents approximately 750 federally insured bank and thrift institutions that hold more than eighty percent of all consumer deposits, and more than seventy percent of all consumer credit held by federally insured depository institutions.

The New York State Bankers Association ("NYSBA") is the principal trade associations for the banking industry within that state. The NYSBA participated actively in *New York State Association of Life Underwriters v. New York State Banking Department*, 83 N.Y.2d 353 (1994) ("*NYSALU*"), a case in which the state Court of Appeals unanimously upheld the right of state-chartered banks to sell annuities. Indeed, the litigation arose directly from a NYSBA initiative. The NYSBA thus is uniquely well situated to elucidate the issues decided by *NYSALU* and their relevance to this case. The decision of the Fifth Circuit, if affirmed, would upset the balance between the powers of state and federally-chartered banks in New York, the largest banking market in the country and in those other states in which state chartered banks are authorized to engage in annuity sales and brokerage. It casts a cloud over the power of national banks in New York, including some of the largest banking organizations in the United States, to sell annuities, at the same time that their State-chartered brethren (also some of the nation's largest banking organizations) now are free to do so without limitation. This result is all the more anomalous because the two governing statutes are identical for this purpose, and indeed the state law served as the

model for the National Bank Act.[1] Rules of statutory construction provide that the meaning of a predecessor statute is instructive in interpreting an adopting statute as well.[2]

Even more significant, the continuing vitality of the national bank charter, in New York and other states, will be brought into question if the decision below stands. The Fifth Circuit's narrow construction of the National Bank Act's "incidental powers" clause stands in stark contrast to the progressive, forward-looking reading of the identical language under New York law by the New York Court of Appeals--a difference that cannot fail to be noted by national banks in the highly competitive New York market. Indeed, within the past year at least three New York institutions have surrendered their national charters in favor of a state charter.

In Louisiana, a state statute expressly ties the authority of state-chartered banks to sell annuities to the outcome of this case--and does so by name. La. Rev. Stat. Ann. 6:242 (A)(16). The authority of state-chartered banks to engage in some fashion in the insurance agency business is likewise dependent, in large part, upon the ability of national banks to do so under Sections 24 (Seventh) and 92 of the National Bank Act. The matter has been in litigation in Louisiana for four years with no resolution yet in sight. (*See American Bank & Trust Co. of Opelousas v. Drake*, No. 93-5040 (5th Cir. 1994)(unpublished)). Finally, soon after (and as a direct result of) the decision below, the Insurance

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[1] Symons, The "Business of Banking" in Historical Perspective, 51 Geo. Wash. L.Rev. 676, 689 (1983).

[2] *Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295, 308 (1898).

Commissioner of Louisiana began an inquiry into the insurance and annuities sales activities of all national banks in the state, clearly with a view toward moving to disrupt and preclude those lawful national bank activities.

SUMMARY OF THE ARGUMENT

This case involves what the Fifth Circuit wrongly perceived to be a conflict between two provisions of federal banking law. On the one hand, Section 24(Seventh) of the National Bank Act grants to national banks the power to engage in the business of banking and to exercise "all such incidental powers as shall be necessary" to carry on that business. On the other hand, Section 92 of the Act provides that national banks located and doing business in small towns may act as the agent in the sale of any insurance. Where a particular insurance product is "incidental" to banking, Section 24(Seventh) would seem, in the abstract, to allow all national banks, wherever located, to market that particular product. Section 92, in the abstract, is said to limit the marketing of insurance products--even those "incidental to banking"--to national banks in small towns, to the exclusion of national banks in larger places.

In point of fact, there is no conflict between these two provisions of law. By its own explicit terms, Section 92 directs that its provisions should give way to pre-existing statutory grants of power to national banks and that they are granted "in addition to" those pre-existing powers. Since Section 24 (Seventh) predates Section 92 by over a half-century, and since, properly construed, nothing in Section 92 derogates powers granted by Section 24 (Seventh), it is clear that the "incidental powers" clause of the statute must take precedence here.

Whether or not Section 92 limits the sale of "insurance" by national banks, the second question the Court must address is whether the sale of annuities, as approved by the Comptroller of the Currency in this case, fits within the grant of "incidental powers" to national banks or within the explicit grant of power to national banks to purchase and sell securities, without recourse, solely upon the order, and for the account of, customers. 12 U.S.C. § 24 (Seventh). The court below dismissed this issue in a one-sentence analysis, limited to the "incidental powers" clause of the statute. The court held that even if "the power to sell annuities would be one incidental to banking, by no stretch of the imagination can that power be deemed "necessary." *Variable Annuity Life Insurance Company v. Clarke*, 998 F.2d 1295, 1302 (5th Cir. 1993) (hereinafter "*VALIC*").

The Fifth Circuit below characterized annuities as insurance products, as if that characterization somehow cast sale of the product beyond the pale of proper banking activities.[3] In point of fact, however, the characterization of an annuity as an insurance product makes it at least as likely, and perhaps more so, that the product does fit within the incidental powers of national banks. In our evolving economy, the banking and insurance industries have become increasingly intertwined since the enactment of Section 92 in a far different era over three-quarters of a century ago. The incidental powers clause of the National Bank Act (or any incidental powers clause), properly understood, is designed to accommodate evolution in the banking industry, not, as the Fifth Circuit would have it, to freeze industry practices

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[3] The briefs of both Petitioners in this case point out in detail why this characterization is wrong. No purpose would be served by our repetition of those arguments.

in the mold in effect at the time the applicable law was enacted.

ARGUMENT

I.

SECTION 92 OF THE NATIONAL BANK ACT IS NOT A LIMITATION ON THE INCIDENTAL POWERS OF NATIONAL BANKS

Section 92 of the National Bank Act provides that

> **[i]n addition to the powers now vested by law in national banking associations under the laws of the United States** any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life or other insurance company authorized by the authority of the State in which said bank is located to do business in said State, by soliciting and selling insurance...

Act of Sept. 7, 1916, c. 461, 39 Stat. 753 (emphasis added).

In the written decision of the court below, the opening phrase was omitted when the author set forth the language of the statute was set forth "in relevant part." *VALIC*, 998 F.2d at 1298. Similarly, this language was ignored in the court's logic. This a serious omission, for rather than being outside the "relevant" part of the statute,

it is critical generally to the proper interpretation of the law and specifically to the resolution of the issue before this Court. Its relevance is fundamental, and its exclusion was dispositive, decisive and totally improper. In fact, excluding the opening phrase of Section 92 was prejudicial in the exact sense of the word (See Webster's New Collegiate Dictionary 900 (1980)), as it led to a premature judgment and an unwarranted opinion.

At the time Section 92 was enacted in 1916, one of the powers then--and for the previous fifty-two years--"vested by law in national banking associations under the laws of the United States" was the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking." Act of June 3, 1864, 13 Stat. 99, § 8. It follows that the explicit grant of power in Section 92 was intended to be "in addition to" those activities that are incidental to the business of banking. The Fifth Circuit, however, simply chose to ignore the opening phrase with its inclusive "in addition to" language. Instead, it determined in conclusory fashion both that annuities are a form of "insurance" and that Section 92 automatically raises a negative inference regarding the power of national banks to sell insurance products in places with larger populations.

The analysis is exactly backwards. Because Section 92 is, by its very terms, an additional power, the court below should have determined first what powers national banks possessed already, to which the small town insurance power would be an addition. In 1916, as today, banks possessed "incidental powers." As we show below, that is, and was intended to be, an evolving concept. No Congress can foresee events decades or centuries in the future. But the Congress is often wise enough to realize this shortcoming and to account for it by deeding to a regulator the authority

to determine, from time to time, what has become "incidental." The plain language of the statute is controlling, *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 474 U.S. 361, 373-75 (1986), and the plain language of Section 92 says that it is an additional power, not a limitation. No mere interpretive maxim can explain away so plan a Congressional command.

We do not claim that the grant of power to national banks to engage in the business of banking and to exercise all incidental powers necessary thereto could overcome explicit federal statutory prohibitions against banks engaging in a particular business or in a particular way. But there is no such prohibition here. Even if there were a conflict between Section 92 and Section 24 (Seventh), which there is not, there still would have to be some principled way to choose which of the two sections actually governed the outcome of this case. The Fifth Circuit purports to follow the rule of statutory construction that a specific statute controls over a general one.[4] However, there is no reason to hold (and the Fifth Circuit recites none) that the term "act as the agent for any fire, life, or other insurance company" found in Section 92 is any more (or less) specific than are the terms "carry on the business of banking" and "purchas[e] and sell [] securities and stock" found in Section 24 (Seventh).

Indeed, if the Fifth Circuit is otherwise correct, the "insurance" provision is even broader and more general than contemplated by the Congress that enacted it. According to the Fifth Circuit, the term "insurance" is general enough to

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[4] *VALIC*, 998 F.2d at 1302 (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) and *Busic v. United States*, 446 U.S. 398, 406 (1980).

include--without saying so--a form of annuity that did not even exist until thirty-six years after Section 92 was enacted.[5] If the Fifth Circuit is otherwise correct, the "banking" provision is less general, less broad than contemplated insofar as it does not (according to the court below) include the ability to sell something that this Court has already held to be a "security."[6]

II.

THE SALE OF ANNUITIES IS INCIDENTAL TO BANKING

It is a subject of serious and continuing disagreement among the parties to this case whether annuities are "insurance" products or not. The Comptroller of the Currency and NationsBank, supported by a host of judicial precedents from numerous jurisdictions (including this Court), both contend that annuities more nearly resemble traditional banking products or investment products that national banks are specifically authorized to broker by virtue of Section 24 (Seventh) of the National Bank Act. On the other side, VALIC argues, and the Fifth Circuit held, that annuities are historically the product of insurance companies and are regulated as insurance products under the insurance laws of the fifty states. If, however, annuities are not insurance products, then the alleged negative inference

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[5] This Court has pointed out that variable annuities--covered by the Fifth Circuit decision below--did not come into existence until 1952. *SEC v. VALIC*, 359 U.S. 65, 69 (1959).

[6] *Id.*, at 67-68.

drawn from Section 92 is wholly irrelevant to the outcome of this case.

The Petitioners argue in their briefs, and we concur, that the sale of annuities, however characterized, is incidental to the business of banking without regard to restrictions on the sale of insurance, whether embodied in state or federal law. In this regard, the recent unanimous decision of the New York Court of Appeals, construing identical language under New York law, stands in stark contrast to the Fifth Circuit's narrow and antiquated notion of "incidental powers." *NYSALU*, *supra*, 83 N.Y.2d 353 (1994). As previously noted, the "incidental powers" clause of the National Bank Act was derived directly from and is identical to the provision of New York Banking Law at issue in *NYSALU*. Compare 12 U.S.C. Section 24 (Seventh) with New York Banking Law Section 96. The approach of the New York Court is thus particularly instructive.

In language strikingly similar to that of the Fifth Circuit below, the lower court in New York had held that "the incidental powers language must be construed as allowing only such activity as is necessary to put into effect the express powers authorized by the statute...the selling of annuities is not such an activity." On appeal, the Appellate Division, Third Department, of the New York Supreme Court unanimously reversed that reading, and on March 30 of this year, the Court of Appeals unanimously affirmed the Appellate Division. Noting that it had consistently rejected such a narrow reading since its landmark decision in *Curtis v. Leavitt*, 15 N.Y. 9 (1857), the court held that "...the business of banking is not static but rather must adjust to meet the needs of the customers to whom banking organizations provide a valuable service...care should be taken not to cripple [banks] by a narrow and unreasonable

construction of the statutes which will unwisely limit their usefulness in the transaction of business under modern conditions (citations omitted)."

Even assuming, for purposes of argument only, that annuities are insurance products, that does not mean, ipso facto, that they are not "incidental" to banking. Indeed, quite the converse is the case.

According to the Fifth Circuit, "[p]rior to the 1916 enactment of Section 92 it seems to have been universally understood that no national banks possessed any power to act as insurance agents." *VALIC v. Clarke*, 998 F.2d at 1303 (citing the Fifth Circuit's own opinion in *Saxon v. Georgia Association of Independent Insurance Agents*, 399 F.2d 1010, 1013 (5th Cir. 1968)). What may have been true in 1916 is, however, not true today. If the banking industry had not, by 1916, evolved to the point where selling of some form of insurance was included within the "incidental powers" of national banks, those banks have, since then, evolved past that point. The incidental powers clause of the statute allows for such evolution, and national banks did, of course, possess "incidental powers" in 1916 and had for over fifty years. As the Ninth Circuit has held, the National Bank Act "did not freeze the practices of national banks in their nineteenth century forms....[T]he powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *M&M Leasing Corp. v. Seattle First National Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).[7] If banking is not to be "frozen" in the distant past,

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[7] In a nonbanking context, this Court has adopted a similarly broad view of the administration of federal regulatory statutes: "Flexibility and adaptability to changing

then logically there must come a time when a practice that was once not "incidental" becomes "incidental."

Today, as many as thirty-four states allow their own state-chartered banks to engage in the insurance agency business in some form or another.[8] That is an important consideration in construing the incidental powers clause of the National Bank Act, since this Court has held that a power is incidental if it is a "generally adopted method" of banking. *Colorado National Bank v. Bedford*, 310 U.S. 41, 50 (1940). The laws authorizing such powers in Indiana and in Delaware have been upheld by the federal courts over the objection of the insurance industry and even (in the case of Delaware) of the Board of Governors of the Federal Reserve System. *See, Independent Insurance Agents of America v. Board of Governors of the Federal Reserve System*, 890 F.2d 1275 (2d Cir. 1989), *cert. denied*, 111 S.Ct. 44 (1990); *Citicorp v. Board of Governors of the Federal Reserve System*, 936 F.2d 66 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 869 (1992). State courts have also regularly upheld laws granting insurance agency powers to commercial banks and

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needs...is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile and changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Associations v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967). The decision of the Comptroller of the Currency is clearly consistent with this philosophy.

[8] See Appendix attached hereto.

other depository institutions. *See, e.g., Calfarm v. Deukmejian*, 48 Cal.3d 805 (1989); *Independent Insurance Agents of Ohio v. Fabe*, 63 Ohio St.3d 310, 587 N.E.2d 814 (1993); *Ludington Service Corp. v. Commissioner of Insurance*, 444 Mich. 481, 511 N.W.2d 661, *reh'g denied*, 444 Mich. 1240 (1994). In upholding the power of New York banks to broker annuities, the State's highest court also upheld the Banking Department's opinion that under New York law a New York State-chartered bank may own a subsidiary engaged in any line of business that is not otherwise unlawful, arguably including an insurance agency, with prior approval of the State's Banking Board. *NYSALU*, *supra*, 83 N.Y.2d 353. National banks may act as the agent in the sale of credit life insurance. *Independent Bankers Association of America v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980). National banks may operate a subsidiary for the purpose of issuing municipal bond insurance under the incidental powers clause of the National Bank Act. *American Insurance Association v. Clarke*, 865 F.2d 278 (D.C. Cir. 1989); National banks may offer debt cancellation contracts to their customers, *First National Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990), even though such contracts constitute "insurance" for purposes of the relevant state law, *Douglas v. Dynamic Enterprises*, 315 Ark. 575, 869 S.W.2d 14 (Ark. 1994). National banks have and exercise the powers granted by the law under consideration here to act as agent in the sale of insurance from small town offices to customers wherever found. *Independent Insurance Agents of America v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993).

Many banks, both state and national, are affiliated with insurance agencies by virtue of common ownership by a bank holding company. Bank holding companies may

engage in the general insurance agency business in small towns so long as they have a lending office there. *Independent Insurance Agents of America v. Board of Governors of the Federal Reserve System*, 835 F.2d 1452 (D.C. Cir. 1987). Prior to the enactment of amendments to the Bank Holding Company Act in 1970 and 1982, a number of bank holding companies were engaged in the insurance agency business; those companies were allowed by law to remain in the business and, in some cases to expand their insurance agency businesses, after the amendments to the Act were passed. Bank holding companies retain their "grandfathered" rights to operate insurance agencies after acquisition by non-grandfathered holding companies. *National Association of Casualty and Surety Agents v. Board of Governors of the Federal Reserve System*, 856 F.2d 282, *on denial for petition for reh'g and reh'g en banc*, 862 F.2d 351 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989). A bank holding company with a grandfathered insurance agency business may offer title insurance even if it was not offering that product on the grandfather date. *American Land Title Association v. Board of Governors of the Federal Reserve System*, 892 F.2d 1059 (D.C. Cir. 1989). A grandfathered insurance agency can be reinstated even if it had been allowed to lapse. *The Glastonbury Company v. Gillies*, 550 A.2d 8 (Conn. 1988).

Nor is the growing coalescence between the banking industry and the insurance industry by any means a one-way street. A considerable number of companies already engaged in the insurance business in some form have, within the last several years, created or acquired commercial banks. Most prominent examples among these would include Sears, Roebuck and Company, which has long owned Allstate Insurance Co., and, also owned the Greenwood Trust Company of New Castle, Delaware, a $7.5 billion asset bank

which issues the Discover Card. American Express, which owns the Fireman's Fund Insurance Companies, likewise owns three commercial banks--IDS Trust Co., Minneapolis, American Express Bank International, New York, and American Express Centurion Bank in Newark, Delaware. Beneficial Corporation owns a dozen insurance companies directly or indirectly, which are engaged in both underwriting and selling of insurance as agents. It also owns Beneficial National Bank of Wilmington, Delaware. Control Data Corporation, with eleven insurance subsidiaries, owns Primerica Bank of Newark, Delaware. Prudential Insurance Company owns Prudential Bank & Trust Co. of Atlanta.

All of the above developments are of more recent vintage than 1916. What was or may not have been "generally adopted" at the time of enactment of Section 92 of the National Bank Act has been "generally adopted" in large measure by the banking industry of 1994.

The briefs of the Comptroller and NationsBank have elaborated upon the similarities between annuities and various other banking products in order to show that annuity sales are a part of the business of banking or are that they are incidental to that business. To the extent that annuities may resemble "insurance" products, that factor, too, supports a finding that the sale of annuities is incidental to the business of banking as it is practiced in a modern economy, regardless of whether it would have been included in the business of banking as it was practiced before the First World War.

CONCLUSION

For all of the reasons above, your amici respectfully urge the Court to reverse the decision of the Fifth Circuit below.

Respectfully submitted,

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